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SUPREME COURT OF THE UNITED STATES

October Term, 1941

Number 211

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ROBERT M. HANNAN, et al.,
Petitioners

v.

CITY OF HAVERHILL, et al.,
Respondents

■

Petition for Writ of Certiorari to the United States First Circuit Court of Appeals

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SUPREME COURT OF THE UNITED STATES
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ROBERT M. HANNAN, et al.,
Petitioners

v.

CITY OF HAVERHILL, et al.,
Respondents

■

Petition for Writ of Certiorari to the United States First Circuit Court of Appeals

To the SUPREME COURT
OF THE UNITED STATES OF AMERICA:

Robert M. Hannan, Oscar Ducharme, Arthur W. Howell, Richard F. Flint and H. G. Judson, petitioners, present this their petition for writ of certiorari and show unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Statement of Facts.*

The City of Haverhill has for many years had in force and effect an ordinance, providing, among other things, as follows:

> "No person except newsboys selling newspapers shall stand in any street or way for the purpose of selling any article, or for the exercise of any business or calling unless otherwise provided by law, ordinance or special permit." (R. 6, 28)

The above is the only pertinent part of the ordinance which is material here because the petitioners have never asked for a permit under the ordinance. (See stipulation appearing in Appendix A to this petition.) This ordinance is identical with the General Laws of Massachusetts, Acts of 1907, Chapter 584, as amended by Acts of 1909, Chapter 329, involved in *Pascone* v. *The Commonwealth of Massachusetts,* certiorari proceedings filed simultaneously with this petition in which the validity of such provisions of law here involved was upheld as to work of Jehovah's witnesses.

This action was begun to restrain the respondents from enforcement of the aforesaid ordinance as to the petitioners.

2. *Complaint.*

Petitioners, Jehovah's witnesses, alleged that they were *ordained ministers* of Jehovah God, preaching the Gospel of God's Kingdom publicly upon the streets of Haverhill by means of distributing literature published by the Watchtower Bible & Tract Society relating exclusively to Biblical matters and showing that the time is near at hand for the complete destruction of Satan's organization, including commercial, ecclesiastical and political elements solely by the force and invisible power of Almighty God at Armageddon. That such destructive work will be followed by complete establishment of God's Kingdom or Theocracy in the earth whereby all people who obey His righteous laws will survive and live forever upon this earth in peace and prosperity with endless joy and blessings. The literature also shows that there is a difference between religion and Christianity in that the former is of Satan, the Devil,

which is used to deceive man and blind man to God's Theocracy and lead man into destruction; while Christianity is described as the practice of willingly and joyfully obeying the commands of Almighty God as set forth in the Bible even to the point of death, if necessary: that is, following in the footsteps of the Lord Jesus and His apostles.

It is alleged that petitioners distributed said literature in the same manner that newsboys on the streets distributed their newspapers.

It is alleged that petitioners had been carrying on their work for some time prior to April 6, 1940, in Haverhill in the above manner. That on or about April 6, 1940, the respondents began arresting the petitioners under the above described ordinance solely on account of distributing said literature and receiving contributions for the same. That such arrests continued from month to month up to the time the complaint was filed at which time thirty-five different ones of Jehovah's witnesses had been arrested and prosecuted under said ordinance. It is alleged that the petitioners were denied the right of making their defense, convicted and compelled to hire attorneys and appeal their cases, compelled to lie in filthy jails under unhealthy conditions over the week-ends, undergo the necessity of providing bond repeatedly on arrest and conviction, suffer loss of money and incur great expense. That such conduct on the part of the respondents had frustrated and completely stopped the preaching of the Gospel in the above described manner. That petitioners had been denied their right of freedom of speech, press and worship contrary to the Fourteenth Amendment and that the ordinance as construed and applied by the respondents was unconstitutional and contravened the Fourteenth Amendment to the United States Constitution because as so applied it abridged and denied the petitioners the above described rights. That the petitioners had been threatened with continued arrests and prosecution as long as they continued to use the streets to "sell" such magazines. That petitioners had no adequate

remedy at law and would suffer and had suffered irreparable injury which would continue to be certain and immediate unless such conduct on the part of the respondents be enjoined. The complaint prayed for a preliminary injunction. (R. 1-13)

3. *Answers.*

Respondents' answers are identical, in which every allegation of the complaint is denied except that petitioners and others had been arrested under the aforesaid ordinance, existence of which ordinance is admitted, and that such arrests had been repeated and continued during the last several months prior to filing of the complaint, and that such arrests and enforcement of said ordinance as to petitioners because of activity described in their complaint would continue. (R. 15-17)

4. *Hearing.*

On the order of the court the hearing was held on affidavits.

Arthur Howell, one of petitioners, testified at length and to all the facts hereinabove shown under heading "Complaint" and in support of each and every allegation in the complaint. (R. 20-25)

On May 11, 1940, Howell and seven others were arrested and thrown in jail for distributing the literature and were thereafter tried on May 13, 1940, and unlawfully convicted of violating said ordinance of which they were not guilty, and forced to make bond and appeal. (R. 20-22)

On May 18, 1940, Howell and twenty-two others were arrested for distributing the literature and were later given a farce trial without right of making a defense, convicted and forced to appeal. (R. 22-24)

On December 21, 1940, Howell and two others were

arrested and thrown in jail on account of distributing said literature and falsely charged with violating said ordinance and held in jail for three days before trial before Justice Sawyer, who denied them the right to make a defense. (R. 23-24)

That on January 16, 1941, Howell and Flint were again arrested, falsely charged with violating said ordinance, thrown in jail and subsequently put through a farce trial without privilege of making defense and forced to take additional appeal. (R. 24)

The respondents, Henry D. Lynch, Charles E. Sawyer, W. Clifford McDonald and the City of Haverhill, have threatened to continue to arrest and to prosecute under said ordinance every one of Jehovah's witnesses found at any time distributing the literature on the streets as above described and they have said that this literature cannot be distributed on the streets of Haverhill. They have denied Jehovah's witnesses the right to prove their defense.

The action on the part of the respondents in arresting and threatening to arrest all of Jehovah's witnesses has frustrated and interfered with the work of Jehovah's witnesses, and caused Jehovah's witnesses great damage and loss of their rights by reason of the conduct of the respondents, and they will continue to so suffer unless respondents are stopped from so interfering by order of this Court. Petitioners and Jehovah's witnesses desire to continue this work unmolested by respondents. (R. 20-25)

None of the above evidence was contradicted or denied by any of the respondents.

Richard Flint testified to the same as did Howell. (R. 26-32)

He further testified:

"We were incarcerated in jail and the police refused to release us on our own recognizance. We stayed in jail December 21, 22 and 23, at which last named date we were brought in for trial in the Central District Court of Haver-

hill, before the defendant Charles Sawyer, who presided over said court."

"The jail was extremely filthy and unsanitary, with absolutely no ventilation. The cells that we were confined in were size 4' x 7' with a board bunk without mattress or quilt or any sort of facilities. The cell was equipped with an open toilet without cover, which was incapable of being flushed. It was filled with dirty water and human excrement which could not be flushed or removed, and the stench and filthy, foul odor permeated the entire cell and jail. The walls of the cell were covered over with human excrement as a result of the sewer rats jumping in and climbing out of the toilet each night. Such rats each night climbed over the bunks and me and took possession of the cells throughout the nights. A request to the defendants' agents to ventilate and fumigate the cells was refused. A request to permit us to get out and walk about in the jail and exercise was also refused. We were also refused access to the jail 'Run Around'. During the entire three days we were in jail they refused to give us food and brought water only on request once a day. The temperature was kept at about 90°, and without ventilation the extremely foul odor and stench practically suffocated us and was so unbearable that sleep was impossible and rest was impossible. This jail has been condemned by the State Board of Health for more than three years. There was no place in the cells to wash or shave or clean our bodies, and no water for such purpose was furnished." (R. 28-29)

"Upon the trial of the case, Supreme Court opinion in the case of *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *Irvington,* 308 U. S. 147; and *Cantwell* v. *Connecticut,* 310 U. S. 297, and the Constitution of Massachusetts were called to the attention of the defendant Sawyer and handed to him to read and were read to him by me, after which the defendant Sawyer said, 'This is Haverhill, Massachusetts. The Supreme Court of the United States has noth-

ing to do here. It is all right for New York, New Jersey and Pennsylvania, but it don't hold good here.'

"Defendants have threatened Jehovah's witnesses with prosecution and arrest every time that they are found distributing the literature on the Haverhill streets. They have told Jehovah's witnesses that this work must stop, and that they are not going to allow it to be done in Haverhill. Thereby they have threatened to continue to completely deny Jehovah's witnesses their right of worship, their right of following their occupation of preaching the gospel, and I believe that defendants will carry out their threat and continue to prosecute many others of Jehovah's witnesses, as well as myself, under said ordinance. This will amount to interruption and complete stoppage of the work of Jehovah's witnesses in Haverhill and also result in the incarceration of myself as well as others of Jehovah's witnesses who might be apprehended by the defendants. This conduct should be stopped by this court." (R. 31)

The City of Haverhill, W. Clifford McDonald and Henry D. Lynch in paragraph 13 of their answers separately admitted that the arrests described in the complaint had continued during the last several months prior to filing their answers. (R. 16-19) The said respondents in paragraph 15 admitted that the arrests of the petitioners would continue. (R. 17)

5. *Action of the Trial Court.*

The court took the case under advisement on February 3, and on February 17 filed his opinion and decision in the form of a memorandum denying petitioners' application for preliminary injunction. (R. 43-45) Thereafter on March 4, 1941, the court entered the order denying the application for temporary injunction. (R. 42) The court found that any further attempt to sell the "Watchtower" and "Consolation" magazines on the streets of the City of Haverhill would meet similar prosecution unless en-

joined. (R. 44) The court held, as a matter of law, that respondents had the constitutional right to use the streets for *free* distribution of the magazines and other literature, which obviously did not come within the terms of the ordinance, but that when such magazines were *sold* such activity "of taking money for the magazines" did not receive constitutional protection, and that such activity was properly within the terms of the ordinance which as construed by respondents to cover petitioners' activity was constitutional and valid, and for such reasons the court denied the prayer for preliminary injunction. (R. 44)

The trial court found that it had jurisdiction in equity and that the application for temporary injunction was denied solely because of the constitutionality of the ordinance. The trial court said:

> "This court's jurisdiction in equity is not assailed by the defendants, and the case is here treated as involving the *sole issue* to which counsel on each side addressed their oral arguments." (R. 43)

Oral arguments were addressed to the trial court on the sole question of constitutionality of the ordinance.

The trial court held the ordinance to be constitutional because the city could regulate "sale" of literature which petitioners were engaged in distributing.

6. *In the Circuit Court of Appeals.*

Petitioners briefed the question of right to equitable relief. The respondents in their brief told the court that no such question was involved since the sole question was the constitutionality of the ordinance and that they were not questioning the right to equitable relief if the ordinance was unconstitutional. The case was submitted May 15, 1941 (R. 52) and decided May 29, 1941 (R. 53-59).

7. *Substantial Federal Questions were Presented.*

In the trial court by express allegations in the bill of complaint petitioners duly attacked the ordinance as being unconstitutional because it, on its face and as construed by respondents, deprived petitioners and other of Jehovah's witnesses of their right of freedom of speech, press and worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution. (R. 9-12) The trial court found the ordinance not to be contrary to the Fourteenth Amendment and held same valid as applied. (R. 43, 44) The respondents contended in the trial court and in the appellate court that the ordinance did not violate the Constitution. The United States Circuit Court of Appeals intimated that the ordinance did not violate the provisions of the Fourteenth Amendment and that the ordinance was constitutional, but refused to pass directly on the question, because it was of the opinion that there was no abuse of discretion shown on the part of the trial court in denying the injunction. (Opinion and Judgment of the Circuit Court of Appeals appears in the Record at pages 52-59.)

That by reason of the foregoing there were seasonably presented to the courts below substantial federal questions, and by reason of the decision of the United States Circuit Court of Appeals there are now presented for review substantial questions as follows:

a) Is the ordinance invalid, as construed and applied by respondents, because it has been used to deprive petitioners of their right of freedom of speech, press and of worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, as amended?

b) Do the facts as alleged, proved and found by the trial court show that the trial court abused his discretion under 28 U. S. C. A. par. 227, in denying the application for preliminary injunction restraining future criminal pro-

ceedings against petitioners and other of Jehovah's witnesses under said ordinance?

B

Reasons Relied on for Allowance of Writ

The questions presented are of national importance and seriously affect the fundamental personal and civil rights of every person within the United States. The Circuit Court of Appeals has rendered a decision on an important federal question in a way which is in conflict with applicable decisions of this Court and has radically and so far departed from the accepted and usual course of judicial proceedings in federal courts as to call for an exercise of this Court's power of supervision to halt the same.

The trial court held that the ordinance in question was constitutional and that the city had the right to regulate and require permits of persons *selling* literature upon the streets while that right did not extend to "free distribution" of literature upon the streets. Thus the trial court held briefly that "freedom of press" meant "free distribution" and did not extend to distribution of literature for which money was received in exchange. This holding is contrary to the plain holding of this Court in *Schneider* v. *State,* 308 U. S. 147, where the proof showed that Clara Schneider accepted contributions for the literature she distributed and was charged with violating the peddling ordinance. The ordinance was held unconstitutional in that case. The holding of the trial court is also contrary to the case of *Cantwell* v. *Connecticut,* 310 U. S. 296, where the evidence showed that the Cantwells accepted money in exchange for the literature which they distributed and were charged with violating the statute prohibiting soliciting for a religious organization. The statute as con-

strued and applied was held by this Court to be unconstitutional and void.

The rule announced by the trial court, affirmed by the Circuit Court of Appeals, is that municipality has the right to regulate selling literature upon the streets by requiring a permit. The streets are the natural and proper place for the distribution of literature and exchanging views on matters of religion and the city cannot under the guise of maintaining good order suppress or deny such right. Such right cannot be abridged on the theory that it can be best exercised at some other place. The petitioners were using the streets in a proper way and their activity thereon could not be properly regulated under the ordinance in question. The holding of the trial court is directly in conflict with the case of *Hague* v. *C. I. O.*, 307 U. S. 496.

The Circuit Court of Appeals spends a great deal of their time in discussing the ordinance and holds that the ordinance is presumed to be constitutional until the Supreme Judicial Court construes the same in such a way as to make it unconstitutionally applied to petitioners' activity. In effect the Circuit Court of Appeals approves the holding of the trial court that the ordinance does not deprive the petitioners of their rights. The court below, after approving the holding of the trial court, attempts to "lock and seal" the door of the Supreme Court against the petitioners on the validity of the ordinance by holding that the facts did not show an abuse of discretion on the part of the trial court in denying the application for preliminary injunction, hence the trial court's ruling is final, and say:

> "All we have to decide on this appeal, and all we do decide, is, that denial of an interlocutory injunction in the circumstances disclosed was not an improvident exercise of the discretion confided to the trial court." (R. 58)

This was contrary to and in spite of the trial court finding that the court had equitable jurisdiction in the circumstances and that the only question before it was the constitutionality of the ordinance.

The undisputed evidence and the pleadings clearly showed:

(1) That the respondents had threatened the petitioners with continued arrest and prosecution.

(2) That the petitioners would suffer irreparable, immediate and certain damage by being jailed repeatedly.

(3) That they would be deprived of their liberty and ultimately denied their rights of press and worship and speech.

(4) That the petitioners had no adequate remedy at law.

(5) That the aforesaid damage would result unless an interlocutory injunction was granted.

(6) None of this evidence was contradicted by the respondents in any way.

The holding of the Circuit Court of Appeals was plainly in conflict with the case of *Hague* v. *C. I. O.*, supra, where an injunction on similar facts was granted. An attempted distinction is made by the court that the plaintiffs there had applied for permits and were denied them. The evidence shows that petitioners are *ordained ministers* and not peddlers and were not within the terms of the ordinance and hence did not have to apply for a permit. The fact that the *Hague* determination was on final hearing does not distinguish it from this case because less clear showing for the injunction is required here on application for preliminary injunction, than upon final hearing as in the *Hague* case; but here the showing is equally strong as the *Hague* case showing.

The *Ohio Oil Company* v. *Conway* case reported in 279 U. S. 813, where this Court reversed an order of the district court denying application for preliminary injunction, was attempted to be distinguished by the Circuit Court of

Appeals on the ground that the law there involved afforded no remedy for restitution of tax moneys illegally collected. Such an attempted distinction is hypercritical and is without judicial reason or merit on facts shown here. Can the petitioners have the many hours of suffering spent in jail, resulting in loss of health and happiness, restored under this law? Is there any provision in the law for restitution of their loss of their right of free press repeatedly denied them by continued prosecutions and arrests under this ordinance? Is there any provision for the great amount of money and damage incurred in securing their release from jail and defending these cases and appealing the repeated convictions? Is there any provision in the law for restitution of the loss of occupation, namely, preaching the Gospel? Civil rights are held by this Court to be most sacred, precious and without money valuation: so, is it possible to have restitution of their repeated loss under this law or any other law? The answer to all these questions is emphatically, NO. Thus the *Ohio Oil Co.* v. *Conway* case, supra, cannot be distinguished and the court erred in sidestepping the plain guide laid down therein for it to follow in failing and refusing to reverse the judgment of the trial court.

In brief, the reasons for the allowance of this writ are that the ordinance is clearly unconstitutional as applied and petitioners have been denied their civil rights thereby; and that the respondents are admittedly threatening to continue to arrest petitioners thereunder; and that by reason thereof petitioners have no adequate remedy at law and will suffer great, grave and irreparable injury which is certain and immediate; hence, the trial court abused its discretion in refusing to grant the application for a preliminary injunction, and also did the Circuit Court of Appeals when it failed to reverse the District Court.

Wherefore your petitioners pray that this Court issue a writ of certiorari to the Circuit Court of Appeals for

the First Circuit, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the Circuit Court of Appeals affirming the trial court be reversed and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

ROBERT M. HANNAN,
OSCAR DUCHARME,
ARTHUR W. HOWELL,
RICHARD F. FLINT,
H. G. JUDSON,
Petitioners

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A
Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is, at time of this writing, not yet reported, but appears in the Record at pages 53 to 58. The opinion of the United States District Court for the District of Massachusetts is unreported and appears in the Record at pages 43 to 45 inclusive.

B
Jurisdiction

1. *Timeliness.*

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347 (a)].

The judgment of the United States Circuit Court of Appeals affirming the trial court was entered of record on the 29th day of May, 1941. (R. 59)

The petition for certiorari is filed herein before the expiration of three months from the date of the decree and judgment of the United States Circuit Court of Appeals.

2. *The Statute.*

The validity of the state legislation under the United States Constitution was drawn into question in this case and the decision of the United States Circuit Court of Appeals was wrongfully in favor of its validity. The legislation challenged here is an ordinance of the City of Haverhill, Massachusetts, which requires a license to sell or carry on a vocation upon the streets of the city.

The pertinent part of the ordinance is set forth on pages 6, 21, 28 and 43 of the Record. (See stipulation, Appendix A to this petition.) The existence of the ordinance as alleged was admitted by respondents.

In holding that the ordinance is not unconstitutional and did not abridge freedom of speech, of press and of worship to the petitioners, the trial court decided that the ordinance properly applied to the activity of petitioners and decided in favor of its validity as applied (R. 43-45), and the Circuit Court of Appeals affirmed the holding of the trial court by refusing to reverse the decision of the trial court. (R. 53-59)

From the beginning of the action the validity of the ordinance here challenged as being in contravention of the United States Constitution was thus drawn in question. The judgment of the trial court was in favor of the validity of such ordinance and the judgment of the Circuit Court of Appeals wrongfully approved such holding through its decision that the trial court did not abuse its discretion in refusing to grant the application for preliminary injunction.

C

Statement of the Case

A full statement of the case has been given herein (supra, pages 1 to 10) and for the sake of brevity will not be repeated but is here referred to.

D

Specification of Errors

The petitioners assign the following errors in the record and proceedings of said case:

The Circuit Court of Appeals committed fundamental

error in affirming the judgment of the trial court and upholding the decision of the trial court denying application for preliminary injunction because

1) The ordinance is invalid, as construed and applied by respondents, because it has been used and will be used to deprive petitioners of their rights of freedom of speech, of press and of worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871 as amended.

2) The facts as alleged, established by undisputed evidence and as found by the trial court, show that the trial court abused his discretion under 28 U. S. C. A. par. 227, in denying the application for preliminary injunction restraining future criminal proceedings against petitioners and other of Jehovah's witnesses under said ordinance for taking contributions on the street in exchange for the literature distributed by them.

And for these reasons it is reversible error for the United States Circuit Court of Appeals to refuse to set aside the judgment of the trial court declaring the ordinance to be constitutional and valid as applied to the activity of petitioners.

ARGUMENT

ONE

The ordinance is invalid, as construed and applied by respondents, because it has been used and will be used to deprive petitioners of their rights of freedom of speech, of press and of worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871 as amended.

Petitioners are engaged in distributing literature of a nature protected by "free press" guarantee. They were distributing same on the streets, which place this Court has repeatedly held to be the natural and proper place for dissemination of information. The ordinance in question is aimed at peddlers of merchandise and is not specifically aimed at the sale of literature. However, the ordinance has been wrongfully applied by the respondents to such activity through the arrests and prosecutions of the petitioners. Such an ordinance may be properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets, but it is not appropriately applicable to regulate the sale and distribution of literature of the sort offered for sale by petitioners. *Schneider* v. *State,* supra.

It is the wrongful application of the ordinance by the respondents which makes the same unconstitutional as to the petitioners. In *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535, 545, the rule to be followed here is announced as follows:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment

> often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

The undisputed evidence shows that this method of distribution was one of the ways employed by the petitioners to preach the Gospel of God's Kingdom. It cannot be said that this is not an appropriate way to preach the Gospel, because it is not for the courts to say which way is or is not a proper mode of worship. That is to be determined solely by the creature in his conscientious endeavor to do the will of his Creator, the Almighty God. The application of the ordinance likewise deprives the petitioners of their right of worship of Almighty God, contrary to the Constitution.

The holding of the trial court is directly in conflict with the prevailing American rule announced by this Court in *Schneider* v. *State,* supra, *Lovell* v. *Griffin,* supra, and *Cantwell* v. *Connecticut,* supra. The holding of the trial court is clearly contrary to the holding of this Court, in the cases of *Grosjean* v. *American Press Company,* 297 U. S. 242; *Near* v. *Minnesota,* 283 U. S. 697, 707; and *Gitlow* v. *New York,* 268 U. S. 652, 666.

It is also contrary to many holdings of the appellate courts of many of the states where ordinances aimed at commercial peddling of ordinary articles of merchandise have been held unconstitutional as applied to the activity of Jehovah's witnesses in distributing literature and taking in exchange therefor contributions in money. These cases are: *People* v. *Kieran et al.,* 26 N. Y. S. (2) 291; *Tucker* v. *Randall* (N. J.), 15 A. (2) 325; *Commonwealth* v. *Anderson* (Mass.), 32 N. E. (2) 684; *City of Gaffney* v. *Putnam* (South Carolina Supreme Court opinion rendered June 2, 1941, unreported at time of this writing); *Semansky* v. *Stark, Sheriff,* 199 So. 129 (La.); *Thomas* v. *Atlanta,* 59 Ga. App. 520, 1 S. E. (2) 592; *Cincinnati* v. *Mosier,* 61

Ohio App. 81; *California* v. *Northum et al.*, 103 Cal. Supp. 295, ... Pac. (2) ...; *Village of South Holland* v. *Stein*, 26 N. E. (2) 868 (Ill).

We submit that the trial court clearly erred when it held (AS HIS SOLE AND ONLY REASON FOR DENYING THE APPLICATION FOR PRELIMINARY INJUNCTION) that the ordinance did not deprive petitioners, as applied, of their rights under the Constitution because they "sold" the literature; and that the right to protection against such a regulation in question extended only to "free distribution" and not to sale of literature. The Circuit Court of Appeals, in effect, also held the same by refusing to reverse the erroneous judgment of the trial court.

TWO

The facts as alleged, established by undisputed evidence and as found by the trial court show that the trial court abused its discretion under 28 U. S. C. A. par. 227 in denying the application for preliminary injunction restraining future criminal proceedings against petitioners and other of Jehovah's witnesses under said ordinance for taking contributions on the street in exchange for the literature distributed by them.

In spite of the fact that the trial court found that there was no question as to equitable relief and that the only question involved was the constitutionality of the ordinance the Circuit Court of Appeals found that the District Court did not abuse its discretion in denying the application for preliminary injunction.

The decision and holding of the Circuit Court of Appeals is clearly in conflict with established principles of

equity announced by this Court viewed in light of the undisputed evidence in this case. The opinion is contrary to *Ohio Oil Co.* v. *Conway,* supra, vacating order denying preliminary injunction where the court said:

> "Where the questions presented by application for interlocutory injunction are grave, and injury to moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while, if injunction be granted injury to opposing party, even if final decree be in his favor, will be inconsiderable, or may be adequately indemnified by bond, injunction will usually be granted."

In Volume 6, page 941, paragraph 3240 of *Cyclopedia of Federal Procedure* the right to preliminary injunction is discussed and among other things it is said:

> "Probability of right is sufficient to authorize a preliminary injunction. In many cases it is granted to preserve property in status quo during the pendency of a suit in which the rights to it are to be decided and that without expressing and often without having the means of framing any opinion as to such rights."

The holding of the Circuit Court of Appeals on this point is also contrary to *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 337; *Public Service Commission* v. *Wisconsin Tel. Co.,* 289 U. S. 67, 71; and *Prendergast* v. *New York Tel. Co.,* 262 U. S. 43, because the questions presented were grave*, the injury to the petitioners cer-

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**Hague* v. *C. I. O.* (Justice Stone): "No more *grave* and important issue can be brought to this court than that of freedom of speech and assembly, which the due process clause guarantees to all persons."

tain and irreparable in the denial of the application, and the final decree should be in their favor. Furthermore, in the granting of the injunction the injury to the respondents is inconsiderable and even if final decree be in their favor they may be adequately indemnified by a bond. Thus the preliminary injunction should have issued.

Petitioners have been repeatedly arrested and prosecuted under the ordinance, thrown into jail to there remain over each week-end under unhealthy surroundings, given a farce trial, convicted contrary to the evidence and law, forced to appeal, had their work frustrated and destroyed, suffered great pain and anguish, suffered loss of their work and occupations, incurred great expense in securing their release and appeals; all of which showed that they would suffer irreparable injury which was immediate, certain and great, without remedy for restitution in any way. Further facts showing lack of adequate remedy at law and irreparable injury appear in the affidavits of Howell and Flint. (R. 20-32) See also pages 4-7, supra.

The principle announced by the Circuit Court of Appeals is contrary to the case of *Hague* v. *C. I. O.,* supra, and the attempted distinction from facts of this case in the opinion (R. 57) finds no justification in law or reason, because the circumstances of both cases are identical. The holding is contrary to the discussion on equitable relief in that case; and also see discussion in the case of *Watson* v. *Buck* and *Buck* v. *Watson,* Nos. 610, 611, October Term, 1940.

Continuing violation of Constitutional rights affords a ground for equitable relief. *Johnson* v. *Wells Fargo & Co.,* 239 U. S. 234. In *Hague* v. *C. I. O.,* supra, Justice Stone said:

> "It is enough that petitioners have prevented respondents from holding meetings and disseminating information."

A case directly in point here is the case of *Dearborn Independent* v. *Fitzgerald,* 271 F. 479, where an injunction was granted restraining arrests of distributors of the "Dearborn Independent", where the court said:

> "Defendant's action, however, prevents other sales from time to time and from week to week. This is a continuing course of conduct, and, if not supported by a valid constitutional law or is in excess of authority conferred on them by any valid law or ordinance, becomes a continuing and repeated wrong. In this situation a court of equity has from time immemorial granted relief upon two well established principles: one is for the multiplicity of actions which would be necessary to redress a continuing and repeated wrong; the other is the irreparable nature of the injury inflicted; in that the damage is not susceptible of accurate ascertainment at law."

Cases in point holding that officials can be enjoined from enforcing unconstitutional criminal statutes and restraining *future* criminal proceedings are *Cline* v. *Frink Dairy Company,* 274 U. S. 445; *Ex Parte Young,* 209 U. S. 123; *Raich* v. *Truax,* 239 U. S. 33, affirming 219 F. 273; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Adams* v. *Tanner,* 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 506; *Home Telephone & Teleg. Co.* v. *Los Angeles,* 227 U. S. 278, 293; *Western Union Teleg. Co.* v. *Andrews,* 216 U. S. 165, and *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 217.

It is within the power and it is the duty of the United States Courts in instances such as here presented to restrain enforcement of an ordinance valid on its face which is applied and enforced in an unconstitutional manner. *Watson* v. *Buck, Buck* v. *Watson,* supra, decided May 26, 1941, by this Court. See also *Greene et al.* v. *Louisville & Interurban Railroad Co.,* 244 U. S. 499, 506-508, 522-531;

Sterling v. *Constantin,* 287 U. S. 393 (378); *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434; *Colorado* v. *Toll,* 268 U. S. 228, 230, and *Work* v. *Louisiana,* 269 U. S. 250, 254, where it is said:

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. Noble v. Union River R. R., 147 U. S. 165, 171, 172; Garfield v. Goldsby, 221 U. S. 249, 261, 262; Lane v. Watts, 234 U. S. 525, 540; Payne v. Central Pac. Ry. Co., 255 U. S. 228, 238; Santa Fe Pac. Railroad v. Fall, 259 U. S. 197, 199."

We submit that the ordinance is void on its face but if not so found by this Court it is manifestly unconstitutional as applied to the undisputed facts in this case.

The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. *Payne* v. *Hook,* 7 Wall. 425, 19 L. Ed. 260, 262; *Watson* v. *Sutherland,* 5 Wall. (72 U. S.) 78, 18 L. Ed. 582.

It is not enough that there is a remedy at law. It must be plain and adequate, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. *Boyce's Exr.* v. *Grundy,* 3 Pet. 210, 7 L. Ed. 655; *Payne* v. *Hook,* supra; *United States* v. *Howland,* 4 Wheat. 108, 4 L. Ed. 526; *Osborn* v. *United States Bank,* 9 Wheat. 738, 841, 842; 6 L. Ed. 204; *Barber* v. *Barber,* 21 How. (62 U. S.) 582.

There may be a legal remedy, and yet if a more complete remedy can be had in equity, it is a sufficient ground for jurisdiction. *Wylie* v. *Coxe,* 15 How. 415, 14 L. Ed. 753, 755.

To bar equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of

the complainant. Where the remedy at law is not as practical and efficient to the ends of justice and its prompt administration, the aid of equity may be invoked. *Lewis* v. *Cocks,* 23 Wall. (90 U. S.) 466. *Boyce* v. *Grundy,* supra.

In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by the state practice. *Stratton* v. *St. Louis S. W. Ry. Co.,* 284 U. S. 530; *Scott* v. *Neely,* 140 U. S. 106, 110, 111; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379.

When irreparable injury is spoken of it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation of damages, but of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279, 306; *Chicago General R. Co.* v. *Chicago B. & Q. R. Co.,* 181 Ill. 605, 611, 54 N. E. 1026; *Newell* v. *Sass,* 142 Ill. 104, 115, 116, 31 N. E. 176; *Carpenter* v. *Capital Electric Co.,* 178 Ill. 29, 36, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286; *Lowery* v. *City of Pekin,* 186 Ill. 387, 398, 57 N. E. 1062, 51 L. R. A. 301.

It is a settled principle of equity jurisdiction that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. *Davis* v. *Wakalee,* 156 U. S. 680, 688; *Boyce* v. *Grundy,* 28 U. S. (3 Pet.) 210; *Watson* v. *Sutherland,* supra; *Rathbone* v. *Warren,* 10 Johns. (N.Y.) 587; *King* v. *Baldwin,* 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *American Insurance Co.* v. *Fisk,* 1 Paige (N. Y.) 90; *Teague* v. *Russell,* 2 Stew. (Ala.) 420; *Southampton Dock Co.* v. *Southampton Harbour & Pier Board,* L. R. 11 Eq. 254; *Weymouth* v. *Boyer,* 1 Ves. Jr. 416.

In the case of *Terrace* v. *Thompson,* 263 U. S. 197, 214-216, it was held that the plaintiff would not have to wait until a criminal action was brought against him in State courts to question the constitutionality, but if threatened

with prosecution, could enjoin if sufficient grounds in equity were shown. The court further held that the right to defend in the criminal action would not constitute adequate remedy at law.

In the case of *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 214, 216, the same principle was announced and the following additional statement made:

> "It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party. . . . The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. Bank of Kentucky v. Stone, 88 F. 383; Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2) 12, 16."

To the same effect is the case of *Atlas Ins. Co.* v. *Southern, Inc.,* 306 U. S. 563, 569, which cites the following cases: *Risty* v. *Chicago R. I. & P. Ry. Co.,* 270 U. S. 378, 388; *De Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, 69; *Petroleum Exploration Inc.* v. *Public Service Com.,* 304 U. S. 209, 219.

In this connection, we ask that the Court carefully consider the case of *Railroad and Warehouse Comm. of Minn. et al.* v. *Duluth Street Ry. Co.,* 273 U. S. 625, 628, in which it was held to be unjust to put the plaintiff in an equitable action to the chances of reaching the same result by appealing to the State court.

On this point we would like to call attention to the significant and appropriate statement by Judge Clark in the case of *Nashville, C. & St. L. Ry. Co.* v. *McConnell,* 82 F. 65, 70 (C. C., M. D. Tenn., 1897), which reads as follows:

> "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference by court of equity."

The case at bar is much stronger than any other case by this Court where an injunction has been granted restraining the enforcement of a statute (except the *Hague* case, supra), because the petitioners come into this Court clothed with the general right of a plaintiff in equity and in addition thereto are fortified with the statutory provision of Section 24 (14) of the Judicial Code, and Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, which statutes make it mandatory upon federal courts to accept suits brought by any person to redress the deprivation, under color of law, of any civil right secured by the laws and Constitution of the United States. The very purpose in passing this statute was to protect civil rights and guarantee relief in the federal courts, and thus the rule in reference to the adequate remedy at law cannot be applied to deny jurisdiction in equity in civil right cases. However, in this case the petitioners do not have any adequate remedy at law. This very point was specifically covered in the *Hague* case, supra.

The holding of the trial court is contrary to the decision of the United States District Court for the Western District of Pennsylvania in the case of *Douglas et al.* v. *City of Jeannette,* ... F. Supp. ..., where enforcement of a peddling ordinance was restrained as to Jehovah's witnesses, and contrary to *Reid et al.* v. *Brookville et al.,* where that same court in ... F. Supp. ..., restrained the enforcement of ordinances of three boroughs and one city, prohibiting peddling on the streets and distribution of literature as applied to Jehovah's witnesses. It is also in conflict with another injunction decision in favor of Jehovah's witnesses by the United States District Court of Ohio, Southern District, reported in ... F. Supp. ..., styled *Zimmerman et al.* v. *London et al.* It is also in conflict with another injunction decision in favor of Jehovah's witnesses by the United States District Court of Idaho, reported in ... F. Supp. ..., styled *Kennedy et al.* v. *City of Moscow et al.* The de-

cision of the Circuit Court of Appeals is likewise contrary to each and every one of the cases hereinbefore cited.

CONCLUSION

Petitioners are burdened with heavy expenses, repeated arrests, loss of placements of literature and civil rights, and none can find adequate protection in defense of criminal actions brought in the state court. The respondents admit that they will continue to arrest and prosecute petitioners and other of Jehovah's witnesses found distributing literature on the streets and taking contributions therefor, all of which will continue to frustrate and destroy petitioners' lawful activity.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that errors complained of may be corrected and that to such end a writ of certiorari ought to be granted and this Court should review the decision of the United States Circuit Court of Appeals for the First Circuit.

Confidently submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NUMBER

■

ROBERT M. HANNAN, et al.,
Petitioners,

v.

CITY OF HAVERHILL, et al.,
Respondents.

■

STIPULATION

It is hereby stipulated that the entire ordinance, of which Section 8 is a part, is a very long and involved ordinance, containing many sections, the entire parts of which are not material to this action, except Section 8. No other section, other than Section 8, is material, except the provisions that the Chief of Police has the authority to issue the permit in question, but that no provision is made in any part of the ordinance setting up any rule to guide his unlimited discretion and there is no rule making it mandatory to issue a permit but his discretion in granting or refusing a permit is unlimited.

Dated June 10, 1941.

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